

Karthi a/l Gopal v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
P-05-73-03 OF 2015
AZIAH ALI, TENGKU MAIMUN, AHMADI ASNAWI JJCA
2 NOVEMBER 2015

*Criminal Law — Dangerous drugs — Trafficking in dangerous drugs
— Appellant convicted and sentenced for offence of trafficking dangerous drugs
— Appellant appealed against decision — Whether others had access to drugs
— Whether case proven beyond reasonable doubt — Dangerous Drugs Act 1952
s 39B(2)*

This was an appeal by the appellant against the conviction and sentence by the trial judge on a charge of trafficking in dangerous drugs under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The prosecution's case was that the door to the back room where the drug was found was ajar at the time of the raid whereas the appellant contended that the door was locked and that the door was unlocked using the key seized from him. The appellant also stated that there were two other persons stayed in the house namely Nelson and his wife Jennifer and that the t-shirt found in the said room had the DNA of another person. In the present case, the ground of appeal was that, at the end of the defence case, it could not be said that the respondent had proved its case beyond reasonable doubt as others too had access to the drugs in question and thus, mens rea possession could not be fastened to the appellant.

Held, allowing the appeal, setting aside the order of conviction and sentence of the High Court and acquitting and discharging the appellant:

- (1) The contradiction in the version as regards the door to the said room and the key did not detract from the crux of the defence, namely that others had access to the room (see para 25).
- (2) The admission of the respondent's witness, SP6 that from her investigation a married couple also stayed in the house and the presence of the DNA of another person on the t-shirt hung behind the door where the drugs were found lend credence to the appellant's version that the said room was accessible to others. It is settled principle of law that the prosecution has a duty to exclude the possibility of access by others to the drugs. In the present case, the respondent had failed to prove its case beyond reasonable doubt as the possibility of access by Nelson and Jennifer had not been excluded, which in turn rendered the conviction of the appellant unsafe (see paras 26-28).

A [Bahasa Malaysia summary]

Ini adalah rayuan oleh perayu terhadap sabitan dan hukuman oleh hakim bicara atas tuduhan mengedar dadah berbahaya di bawah s 39B(2) Akta Dadah Berbahaya 1952. Kes pihak pendakwaan adalah bahawa pintu bilik belakang di mana dadah diperolehi terbuka pada masa serbuan tersebut sebaliknya perayu berhujah bahawa pintu adalah berkunci dan bahawa pintu dibuka menggunakan kunci yang dirampas daripadanya. Perayu juga menyatakan bahawa terdapat dua orang lain yang tinggal di dalam rumah tersebut iaitu Nelson dan isterinya Jennifer dan bahawa t-shirt yang diperolehi di dalam bilik tersebut mempunyai DNA orang yang lain. Dalam kes ini, alasan rayuan adalah bahawa, pada akhir kes pembelaan, ia tidak dapat dikatakan bahawa responden telah membuktikan kesnya melampaui keraguan munasabah kerana orang yang lain juga mempunyai akses kepada dadah yang dipersoalkan dan oleh itu, mens rea milikan tidak boleh dikenakan kepada perayu.

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Diputuskan, membenarkan rayuan, mengetepikan perintah sabitan dan hukuman Mahkamah Tinggi dan melepaskan dan membebaskan perayu:

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(1) Percanggahan versi berkaitan pintu kepada bilik tersebut dan kunci tidak mengurangkan daripada teras pembelaan, iaitu bahawa orang lain mempunyai akses kepada bilik tersebut (lihat perenggan 25).

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(2) Pengakuan saksi responden, SP6 bahawa daripada siasatannya pasangan yang berkahwin juga tinggal di dalam rumah tersebut dan kehadiran DNA orang lain pada t-shirt yang digantung di belakang pintu di mana dadah dijumpai membuktikan kebenaran kepada versi perayu bahawa bilik tersebut boleh diakses oleh orang lain. Ia adalah prinsip undang-undang yang nyata bahawa pihak pendakwaan mempunyai kewajipan untuk mengecualikan kemungkinan akses oleh orang lain kepada dadah tersebut. Dalam kes ini, responden telah gagal untuk membuktikan kesnya melampaui keraguan munasabah kerana kemungkinan akses oleh Nelson dan Jennifer tidak dikecualikan, yang mana sebaliknya membuatkan sabitan dan hukuman perayu tidak selamat (lihat perenggan 26–28).]

G**H Notes**

For cases on trafficking in dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 977–980.

Cases referred to**I**

Azizan bin Yahaya v PP [2013] 1 MLJ 180; [2012] 8 CLJ 405, CA (refd)
Ibrahim Mohamad & Anor v PP [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
Mazlani bin Mansor v PP and other appeals [2014] 2 MLJ 18, CA (refd)
Mohamad Abdul Rahman v PP [2013] 7 CLJ 843, CA (refd)

PP v Ang Kian Chai & another appeal [2012] MLJU 158; [2012] 4 MLRA 456, CA (refd) A

Legislation referred to

Dangerous Drugs Act 1952 ss 12(3), 39B(2) B

Appeal from: Criminal Trial No 45A-31-08 of 2013 (High Court, Pulau Pinang)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Tengku Amir Zaki bin Tengku Haji Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. C

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was tried at the Penang High Court for the following two offences under the Dangerous Drugs Act 1952 ('the Act'): D

- (a) for trafficking in 93.6g of dangerous drugs, a mixture of heroin and monoacetylmorphines, an offence punishable under s 39B(2) of the Act; and E
- (b) for being in possession of 0.7g of a mixture of heroin and monoacetylmorphines, an offence punishable under s 12(3) of the said Act.

[2] The offences were said to have been committed at house No 21, Lorong Macang Bubok, Bukit Mertajam (the house). F

THE PROSECUTION'S CASE

[3] In brief, Insp Mohd Hafiz bin Ahmad ('SP5') raided the house of which the appellant was the tenant. The appellant was feeding the dog when SP5 approached and identified himself to the appellant. A search was made on the appellant. Two transparent plastic packets containing powder like substances were found on the appellant, which formed the subject matter of the second charge. A bunch of keys were also found on the appellant. G H

[4] Using the keys seized from the appellant, SP5 and his team entered the house. They proceeded to the kitchen area where they entered the back room. The room was not locked and the door was ajar. There was a purplish bag ('exh P8A') on the floor. The appellant was said to have picked it up and handed it over to SP5. I

[5] From bag P8A, SP5 found:

- A (a) five white paper packages containing translucent packets of substances suspected to be heroin; and
- (b) eight brown paper packages, each package contained two white packages and inside each of the white packages, there were ten plastic packets suspected to be heroin.
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[6] SP5 also found two t-shirts, RZB(B) and RZB(BB) which were hung behind the door of the back room. The t-shirts were sent for DNA analysis and the chemist report ('exh D50') revealed that apart from the DNA profile of the appellant, the DNA profile of another person was detected on t-shirt RZB(BB).

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[7] From the back room, SP5 proceeded to the upper floor of the house. From the first room on the upper floor, SP5 seized a sealer, a weighing scale, a plastic packet containing a number of smaller plastic packets and a receipt in the name of the appellant.

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[8] Upon analysis by the chemist, Kalaivani a/p Ramachandran ('SP7'), the substances found on the appellant and from the back room were confirmed to be dangerous drugs which formed the subject matter of the two charges against the appellant.

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[9] At the end of the prosecution case, the learned trial judge acquitted and discharged the appellant on the first charge. Essentially the decision was premised on the issue of accessibility by others. On the second charge, the appellant was called upon to enter his defence. At the conclusion of the trial, the appellant was convicted on the second charge and was sentenced to five years imprisonment.

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[10] Aggrieved by the decision to acquit and discharge the appellant on the first charge, the prosecution appealed to this court. The appeal was allowed and the appellant was ordered to enter his defence.

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H THE DEFENCE

[11] The accused stated that he rented the house from one Khor Chun Seong ('SP4') and he sublet the house to Nelson and his wife, Jennifer. At the time of the police raid, Nelson and Jennifer were not at home.

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[12] After gaining entry into the house, the police went to the back room near the kitchen. The door was locked and using one of the keys from the bunch of keys that the police seized from him, the door was unlocked by the police. The appellant further stated that the back room was occupied by Nelson

and his wife while he occupied the living room. The appellant also testified that he informed SP6 about Nelson and he gave SP6 the telephone particulars of Nelson. The appellant denied that he gave the bag, P8A to the police. The appellant protested his innocence and stated that the bag belonged to Nelson.

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[13] At the end of the defence case, the learned trial judge made a finding that the bag containing the drugs was picked up by the appellant and handed to SP5. The learned trial judge considered the failure of the appellant to put Nelson to SP5 before concluding that the appellant had mens rea possession of the drugs in the bag seized from the back room. As the amount of the drugs was in excess of its statutory limit, the appellant was presumed to be trafficking in the said drugs. The learned trial judge found that the appellant had failed to cast a reasonable doubt and/or to rebut the presumption of trafficking on the balance of probabilities. The appellant was thus convicted and sentenced to death.

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[14] Against the conviction and sentence, the appellant appealed to this court.

THE APPEAL

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[15] Learned counsel for the appellant canvassed only one ground of appeal, namely that at the end of the defence case, it could not be said that the prosecution had proved its case beyond reasonable doubt.

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[16] The core of the defence case was that others too had access to the drugs in question and as such, mens rea possession cannot be fastened to the appellant for the following reasons:

- (a) the prosecution had not excluded the other occupants of the said house who had access to the drugs;
- (b) the back room was unlocked; and
- (c) the t-shirt had the DNA of another person.

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[17] In support of his submission, learned counsel cited among others the case of *Mazlani bin Mansor v Public Prosecutor and other appeals* [2014] 2 MLJ 18. In *Mazlani*, the defence contended that one Suratman, the worker and friend of the first accused, had a key to the said premise where the drugs were found. This version was however not put to the prosecution witness. The convictions of the accused persons for the offence of trafficking were upheld by the Court of Appeal.

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- A [18] On appeal, the Federal Court set aside the convictions. Learned counsel produced the order of the Federal Court dated 21 August 2014 and his submissions before the Federal Court where the issue of access by others was canvassed. On the authority of the Federal Court decision in *Mazlani*, learned counsel prayed for the appeal to be allowed.

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FINDINGS

- [19] We were unanimous in our view that there were merits in the appeal.

- C [20] The appellant's version that Nelson and his wife Jennifer also stayed in the house was corroborated by SP6 who testified that (AR Vol 1, p 86):

Selain OKT, saya setuju terdapat sepasang suami isteri yang tinggal di rumah.

- D [21] SP6 further said (AR Vol 1, p 88):

Saya setuju hasil siasatan saya, ada orang lain yang tinggal di tempat rumah yang diserbu. Tetapi saya tidak dapat mengesannya.

- E [22] SP5 also conceded that the appellant had informed him about Nelson at the time of the raid. SP5 stated as follows (AR Vol 1, p 72):

Saya setuju, semasa di rumah itu OKT memberitahu ada orang lain tinggal di rumah tersebut. Saya ingat OKT ada memberi orang lain itu bernama Nelson tetapi tidak memberitahu saya nama Jennifer.

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[23] SP5 had testified that the door to the back room was ajar at the time of the raid whereas the appellant in his defence stated that the door was locked and that the door was unlocked using the key seized from him.

- G [24] This contradiction was considered by the learned trial judge where he made a finding that the key in the possession of the appellant was indicative that the appellant was the occupant of the said room.

- H [25] We agreed with learned counsel that the contradiction in the version as regards the door to the said room and the key did not detract from the crux of the defence, namely that others have access to the room.

- I [26] The admission of SP6 that from her investigation a married couple also stayed in the house and the presence of the DNA of another person on the t-shirt hung behind the door where the drugs were found, lend credence to the appellant's version that the said room was accessible to others.

- [27] It is a settled principle of law that the prosecution has a duty to exclude

the possibility of access by others to the drugs (see *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113; *Public Prosecutor v Ang Kian Chai & another appeal* [2012] MLJU 158; [2012] 4 MLRA 456; *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180; [2012] 8 CLJ 405; and *Mohamad Abdul Rahman v Public Prosecutor* [2013] 7 CLJ 843).

[28] Based on a string of decided cases, we found that the prosecution had failed to prove its case beyond reasonable doubt as the possibility of access by Nelson and Jennifer had not been excluded, which in turn rendered the conviction of the appellant unsafe.

[29] We therefore unanimously allowed the appeal. We set aside the order of conviction and sentence of the High Court. The appellant was acquitted and discharged.

Appeal allowed, order of conviction and sentence of High Court set aside and appellant acquitted and discharged.

Reported by Dzulqarnain Ab Fatar

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